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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)))))))	MM Docket No. 92-266

To: The Commission

REPLY COMMENTS OF COALITION OF SMALL SYSTEM OPERATORS

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Dated: September 10, 1993

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REPLY COMMENTS OF COALITION OF SMALL SYSTEM OPERATORS

On behalf of the Coalition of Small System Operators, 1/ we reply to Comments filed in the captioned proceeding in response to the Further Notice of Proposed Rulemaking. 2/

1/ The Coalition of Small System Operators consists of: ACI Management, Inc.; Balkin Cable; Buford Television, Inc.; Classic Cable; Community Communications Co.; Douglas Communications Corp. II; Fanch Communications, Inc.; Frederick Cablevision, Inc.; Galaxy Cablevision; Harmon Communications Corp.; Horizon Cablevision, Inc.; Leonard Communications, Inc.; Midamerican Cable Systems, Limited Partnership; Mid-American Cable Television Association; Midcontinent Media, Inc.; Mission Cable Company, L.P.; MW1 Cablesystems, Inc.; National Cable Television Cooperative, Inc.; Phoenix Cable, Inc.; Rigel Communications, Inc.; Schurz Communications, Inc.; Star Cable Associates; Triax Communications Co.; USA Cablesystems, Inc.; and Vantage Cable Associates. Coalition members own and operate approximately 2,784 headends (representing more than a quarter of the headends in the country), serving approximately 1,297,856 subscribers. Coalition member Mid-American is an association of cable operators serving 1,458,644 subscribers in 1,479 communities located in Kansas, Missouri, Nebraska and Oklahoma.

[Footnote continued]

I. THERE IS NO BASIS FOR DISTINGUISHING BETWEEN INDEPENDENTLY OWNED SYSTEMS AND MSO-AFFILIATED SYSTEMS WHEN PROVIDING SMALL SYSTEM RELIEF

After having reviewed the Comments, we can find no basis in the record for distinguishing between independently owned systems and systems owned by MSOs when providing relief from administrative burdens for small systems. As noted in the Coalition's initial Comments, the record does not provide any rational basis for different treatment of independent and MSO-owned systems. The absence of record evidence is even more striking now that Comments have been submitted. Although a few parties support granting relief from administrative burdens only for independently owned systems, they do not provide any factual basis for doing so.

The National Association of Telecommunications Officers and Advisors ("NATOA"), for example, makes the unsupported conclusory statement that "[MSO-owned] systems are financially and administratively able to comply with the Commission's rate regulations." NATOA Comments, filed August 31, 1993, at 2. 3/. NATOA goes on to conclude -- again, without

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[Footnote continued]

The members of Mid-America have 918 systems with less than 1,000 subscribers. The National Cable Television Cooperative is a purchasing cooperative which represents 360 small and mid-size independent cable companies. These companies together serve more than 2.8 million subscribers in over 2,300 communities nationwide.

2/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 93-389, released August 10, 1993.

3/ It is unclear why NATOA has even participated in this round of comments in view of its membership, which consists almost exclusively of

[Footnote continued]

citing any factual data in support -- that "the MSO has a subscriber base that makes the MSO financially and administratively capable of complying fully with the Commission's rate regulations at each of its cable systems." *Id.* at 4. This theoretical "subscriber base" that will provide the wherewithal for small system MSOs to comply with rate regulations (presumably through subsidization) simply does not exist for most MSOs. As described in detail in the Coalition's Comments, 4/ the systems owned by Douglas Communications clearly illustrate that small system MSOs have even more difficulty with administrative burdens than independent systems. Douglas operates approximately 500 systems, which serve an average of 200 subscribers per integrated headend. Only three of these systems serve more than 1,000 subscribers. The cost of complying with rate regulation at the franchise level must be recovered from the subscribers in that franchise area (which generally vary in number from a handful up to several hundred). There is no other "subscriber base" on which small system MSOs may rely to recover their administrative costs of complying with rate regulation.

In similarly conclusory comments, GTE Service Corporation states in three brief bullet points that only independent systems should receive relief from the administrative burdens of rate regulation because

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[Footnote continued]

representatives of large communities. The sparsely populated, rural communities served by systems with less than 1,000 subscribers are generally not members of NATOA.

4/ Comments of the Coalition of Small System Operators, filed August 31, 1993 at 8-9.

(i) "the cable television business exhibits certain economies of scale;" (ii) MSOs have more resources to devote to the administrative burdens of regulation; and (iii) the costs of compliance can be spread over more cable systems by MSOs. GTE Service Corporation Comments, filed August 31, 1993, at 3. GTE cites several sources for the general proposition that the cable television business exhibits economies of scale, but it does not demonstrate that these "economies" are significantly greater for small system MSOs than for independent operators. Nor does it even attempt to explain how economies of scale justify the uniform application of rate regulations to a given small system just because it happens to be co-owned with another system or systems. In fact, the economies of scale enjoyed by owners of multiple small systems are often necessary to justify operation of these systems at all. In many cases, independent operators cannot afford to operate these systems. It is only because of the MSOs' economies that the systems have been constructed! As with NATOA, GTE utterly fails to explain how a multiple system operator serving many systems with an average of 200 subscribers is more able to bear the administrative burdens of regulation than an independent operator with a single system serving 900 subscribers. 5/

5/ GTE claims that it is "puzzled" by the FCC's declaration that costs are equally high for MSO-affiliated systems as for independently owned systems. But GTE neither articulates any reason for its puzzlement, nor provides any factual basis for it. The Coalition of Small System Operators, on the other hand, has provided many examples of the high costs that small system MSOs experience. *See* Comments of Coalition of Small System Operators, filed August 31, 1993.

Union Telephone Company argues that independent small systems are more deserving of relief from administrative burdens than MSO-affiliated systems. *See* Comments of Union Telephone Company, filed August 31, 1993, at 7. As with the other proponents of this idea, Union cites no facts to support its conclusion that independent systems will be disproportionately burdened by rate regulation. Union merely asserts that "[s]mall systems such as Union's which must meet the same compliance costs and administrative scrutiny as large systems are placed under a disproportionate burden." *Id.* at 7. In support of its requested relief, Union cites the important service provided by it to rural areas -- presumably the same type of important service provided by MSO-affiliated systems serving rural areas. Union also cites the possibility that the burdens of rate regulation may drive it out of business, a spectre haunting all small cable systems.

In short, several parties have tried to argue that small system relief should be limited to independently owned systems, but none has given any reason for doing so. Especially in view of the unqualified statutory mandate to provide relief for all small systems, the Commission cannot exclude MSO-affiliated systems without record evidence to support such a decision.

II. THERE IS NO RATIONAL BASIS FOR IMPOSING A SUBSCRIBER CAP ON MSOS ENTITLED TO SMALL SYSTEM RELIEF

The record in this proceeding also lacks any rational basis for distinguishing between MSOs based on the number of subscribers they serve. "Subscriber caps" would merely draw a line in the sand between systems entitled to small system relief and those not entitled to such relief based on the number of subscribers that their affiliated companies happen to serve. This line would not be drawn based on evidence that the number of subscribers served by an MSO has any bearing whatsoever on the ability of a given small system to withstand the burdens of regulation. No such evidence has been presented. Instead, the line would be arbitrarily based on some criteria designed to exclude those MSOs deemed "too big" to benefit from small system relief. As the Commission has observed, such an artificial point of demarcation will lead to gamesmanship and, ultimately, the need for more rules to prevent evasions. 6/

Other suggestions for treating certain MSOs differently from others based on arbitrary criteria also must be rejected. The Small Business Association, for example, endorses a definition of "small cable system operator" that would include only those operators with less than $7.5 million in gross revenues. Comments of United States Small Business Association, filed August 25, 1993, at 15. This definition is based on criteria in the Small Business Act, *id.*, and does not take into account the size of the individual systems owned by the operator. Although the definition may serve a purpose under the Small Business Act, it does not provide a relevant measuring stick for determining which systems should receive relief from administrative burdens under rate regulation. As observed by the Small Cable Business Association ("SCBA"), the proposed definition based on $7.5 million in gross revenues "currently has no established nexus to the determination of thresholds for the imposition of varying degrees of

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6/ Implementation of Certain Sections of the Consumer Protection and Competition Act of 1992, Rate Regulation, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, ¶ 25, FCC 93-389, released August 10, 1993.

regulatory burdens." Comments of the Small Cable Business Association, filed September 1, 1993, at 10. Moreover, the SCBA correctly points out that any agency definition of a "small business" must be adopted pursuant to the proper procedures under the Small Business Act. *Id.* These procedures have not been followed by here, *id,* precluding the Commission from considering the adoption of this definition in this proceeding. 7/

III. THE NUMBER OF SUBSCRIBERS IN A GIVEN FRANCHISE AREA SHOULD BE USED TO MEASURE THE 1,000 SUBSCRIBER LIMIT FOR SMALL SYSTEM RELIEF

The use of subscribers in a given franchise area, rather than subscribers served by an integrated system, to determine whether a system qualifies for small system relief is critical. Some of the problems identified in the Comments filed by Mullin, Rhyne, Emmons & Topel ("MRET") demonstrate that measurement of the 1,000-subscriber limit must be done at the franchise level. In one example, the MRET Comments describe the dilemma faced by hypothetical Cable Company A, which operates a cable system in a franchise area with almost 1,000 subscribers and wishes to expand into several nearby towns with several hundred potential subscribers each. Under the approach where system size is measured by the number of subscribers served by the integrated system, this operator would be reluctant to extend service into the neighboring towns, as it would lose its protection under the "small system" relief provisions. A definition based on

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7/ SCBA is also entirely correct in objecting to the Commission's proposal to impose a subscribers cap -- limiting the small systems entitled to relief from administrative burdens -- without following required procedures under the Small Business Act. *See* Comments of SCBA at 4-8.

the number of subscribers in the franchise area, however, would not discourage the expansion of service into unserved areas. Nor would it discourage the interconnection of small systems with fiber optic links. Although MRET does not suggest a definition of "small system" based on franchise area, the problems identified in its hypothetical example would be solved by such a definition. More importantly, real-life problems that will develop in the near future -- as consolidation of system ownership and technical interconnection of systems become more prevalent -- would be solved by a forward-looking definition that is based on subscribers in a franchise area.

The measurement of system size based on franchise area will serve the important policy goal of system interconnection. A franchise-based definition will not discourage the elimination of headends or the use of fiber to connect systems. This type of system interconnection results in efficiencies that enable operators to improve programming services. Most importantly, without interconnection, the information superhighway will bypass rural America, leaving residents of rural areas without access to the vast amount of programming, interactive and information services that will be available on the superhighway.

One of the Small System Operators currently has on the drawing board a proposal to develop a "regional headend." The plan is premised on taking advantage of the tremendous efficiencies gained by serving a large area from a single headend to enable the systems served by the headend to offer a much greater selection of programming to subscribers. The "regional headend" concept is dependent upon the willingness of many small systems to join. But if the definition of "small systems" is based on the number of subscribers served by a technically integrated system rather than subscribers in a given franchise area, there will be a strong disincentive for systems with less than 1,000 subscribers to subscribe to the regional headend. The Commission should adopt a franchise-based definition to avoid discouraging improvements in technology, programming and overall service for rural subscribers.

CONCLUSION

The Commission must abide by the clear language of the statute and the record evidence in this proceeding, both of which require <u>all</u> systems with 1,000 or fewer subscribers to receive relief from administrative burdens. No party to this proceeding has submitted any evidence to suggest that small systems owned by MSOs are less burdened by the administrative requirements of rate regulation or more able to bear those burdens. The Coalition of Small System Operators has submitted information to demonstrate that MSOs with many small systems are burdened by rate regulation even more than independently owned systems. Therefore, any definition of "small systems" must include all small systems with 1,000 or less subscribers, regardless of ownership. Finally, there is no rational basis for a subscriber cap to limit the size of an MSO entitled to small system relief. There is no evidence to suggest that the high costs and overwhelming administrative burdens faced by small systems are alleviated once the owner of the system serves a certain number of subscribers throughout all of its systems.

The definition of system size based on the number of subscribers in a franchise area is critical to future improvements in service in rural areas. The development of an information superhighway is entirely dependent upon systems' technical interconnection. If the FCC chooses to measure system size at the integrated system level, rather than the franchise level, it will create a strong disincentive for systems with less than 1,000 subscribers at the system level to interconnect, depriving rural subscribers of the benefits of improved service.

For the foregoing reasons, the Coalition urges the Commission to adopt a definition of "small system" that will provide relief from administrative burdens to all systems with 1,000 or less subscribers, regardless of ownership. And, the number of subscribers should be measured at the franchise level.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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